

ORIGINAL

REED SMITH SHAW & MCCLAY LLP

Writer's Direct Numbers:
Phone 202-414-9276
Fax 202-414-9299
jiharris@rsm.com

1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005-3317
Phone: 202-414-9200
Fax: 202-414-9299

RECEIVED
FEB 17 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 17, 2000

EX PARTE OR LATE FILED

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

Re: Ex Parte Presentation

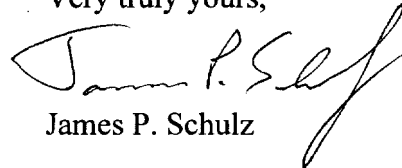
Petition for Reconsideration in CC Dkt. No. 96-45 filed by the Washington State Department of Information Services regarding participation by schools and libraries eligible for universal service support in buying consortia that include private colleges

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206(b)(1), enclosed are an original and two copies of a written *ex parte* presentation to Praveen Goyal regarding the above-captioned matter. Please date-stamp the original provided and return it to the messenger for return delivery to us.

Should there be any questions regarding this matter, please do not hesitate to contact the undersigned at 202-414-9276.

Very truly yours,


James P. Schulz

JPS/lam
Enclosure

No. of Copies rec'd OK
List A B C D E

Harrisburg, PA

McLean, VA

Newark, NJ

New York, NY

Philadelphia, PA

Pittsburgh, PA

Princeton, NJ

Writer's Direct Numbers:
Phone 202-414-9234
Fax 202-414-9299
jpschulz@rssm.com

REED SMITH SHAW & MCCLAY LLP

1301 K STREET, N.W.
SUITE 1100 - EAST TOWER
WASHINGTON, D.C. 20005-3317
PHONE: 202-414-9200
FAX: 202-414-9299

RECEIVED
FEB 17 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE OR LATE FILED February 17, 2000

VIA HAND DELIVERY

Praveen Goyal, Esq.
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: Petition for Reconsideration in CC Dkt. No. 96-45 filed by the Washington State Department of Information Services (regarding participation by schools and libraries eligible for universal service support in buying consortia that include private colleges)

Dear Mr. Goyal:

At your request, I am submitting further information regarding the State of Washington's K-20 Educational Telecommunications Network and the private nonprofit baccalaureate institutions that the State would like to include in that network. I am also attaching a proposed Order granting the waiver we have requested and several charts and diagrams that should help to assist you in understanding the network's architecture.

1) With respect to the network's topography, the "central nervous system" of the K-20 Educational Network is its statewide, high speed, high capacity backbone infrastructure. Network traffic from hundreds of educational sites ("connection points" -- including 304 school districts serving some 2,000 K-12 facilities) is collected and aggregated at seven node sites and is then placed onto the backbone. The backbone is engineered around SONET transport technology and utilizes internodal pathways from OC3 to OC12. Local aggregation hubs are typically linked to the network at OC48.

The economies that the State realizes from the network are driven by the engineering design and purchasing leverage represented in the backbone. The K-20 Network currently connects to public educational institutions at 412 statewide locations. Additionally, the K-20 governing board has recently approved the connection of 68 public library systems. Washington State wants to be able to connect 15 private nonprofit colleges to this network for a number of reasons which we have set forth in our earlier submissions, including increased collaboration opportunities among public K-12 institutions and the institutions that produce approximately one-quarter of Washington State's K-12 teachers.

REED SMITH SHAW & MCCLAY LLP

Praveen Goyal, Esq.
February 17, 2000
Page 2

As discussed above, the network architecture -- the design of which predates the Commission's release of its First Report and Order in the Universal Service docket (see #2, below) -- is based on aggregation of services and traffic for transport over a single backbone. Therefore, integrating these 15 schools into the network while somehow separating their purchases from the bulk purchases of services available to all other network participants could only be accomplished by first placing these few schools on a separate parallel network backbone. Interstate services for this secondary backbone, theoretically, could then be purchased at generally tariffed rates, and this second backbone could be interconnected with the K-20 backbone without the second backbone participating in the buys for the K-20 network. Unfortunately, such an approach would 1) radically increase technological and operational complexity, and 2) introduce network inefficiencies while dramatically increasing costs. The increased costs would result from off-contract purchasing as well as from the technological and operational impact of a second parallel network backbone.

Given that it would be technologically, operationally and economically counterproductive to purchase separate, low capacity, off-contract, backbone circuits to build a parallel, duplicative backbone network, Washington State simply cannot and would not pursue such a "solution." Thus, in the absence of relief from the Commission, the fifteen or so private nonprofit colleges at issue will not be connected to the network, they will be deprived of the network's significant benefits, and, most importantly, the K-12 institutions already connected to the network (and the state at large) will be deprived of the immediate and long-term value that these institutions are in a position to add to Washington State's outstanding educational endeavor.

2) With respect to the historical data you requested, the Washington State Legislature enacted E2SSB 6705 (Ch. 137, Laws of 1996), the enabling legislation that provided for the creation of the K-20 Educational Telecommunications Network, on March 7, 1996, and that bill was signed by the Governor on March 25, 1996. It is codified at Rev. Code Wash. 28D.02. The bill contained an emergency clause that made its provisions effective immediately. Those provisions directed that the K-20 governance board be convened by April 15, 1996, and that the board adopt timelines for construction of the network by June 1, 1996.

The network design for Phase I was approved on May 29, 1996. At the same time, the board also approved the project's technical goals, objectives, standards and services, as well as the Phase I timeline. Procurement was conducted during the fall of 1996; resulting contracts were signed between December 1996 and February 1997. Phase I included the higher educational institutions and the Educational Service Districts (School Districts), which are part of the K-12 sector. Therefore, a substantial portion of the project's first phase had been completed by the time the Commission released its May 8, 1997 First Report and Order. To

REED SMITH SHAW & MCCLAY LLP

Praveen Goyal, Esq.
February 17, 2000
Page 3

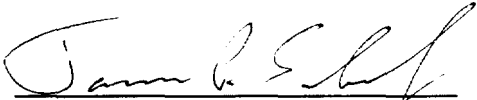
date, Phases I and II have been completed with the exception of the connection to the network of the 15 private colleges in question. Phase III will connect public libraries.

3) The names of the 15 private colleges at issue are: Antioch University, Bastyr College, City University, Cornish College of the Arts, Gonzaga University, Heritage College, Northwest College, Pacific Lutheran University, St. Martin's College, Seattle University, Seattle Pacific University, University of Puget Sound, Walla Walla College, Whitman College, and Whitworth College.

I trust you will find this information helpful. If you have any questions or need further information, please do not hesitate to call.

Respectfully submitted,

**STATE OF WASHINGTON
DEPARTMENT OF INFORMATION
SERVICES**

By: 

Judith L. Harris
James P. Schulz
REED SMITH SHAW & MCCLAY LLP
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005
(202) 414-9200

Its attorneys

cc: Dorothy Attwood, Legal Advisor to Chairman Kennard
Irene Flannery, Chief, Accounting Policy Division, Common Carrier Bureau
Sharon Webber, Deputy Chief, Accounting Policy Division, Common Carrier Bureau
Elizabeth Valinoti, Attorney Advisor, Common Carrier Bureau

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board)	CC Docket No. 96-45
on Universal Service)	
)	
)	

PROPOSED ORDER

I. INTRODUCTION

1. By this Order, we grant a limited waiver to the State of Washington, Department of Information Services (DIS), to permit the state to incorporate certain private nonprofit baccalaureate institutions into its K-20 Educational Network without jeopardizing the ability of the state's K-12 schools to use their universal service discounts.

II. BACKGROUND

2. Washington's K-20 Educational Network was established by the Washington State Legislature in 1996, prior to the Commission's formulation of the universal service rules pursuant to section 254 of the Telecommunications Act of 1996 (Act).¹ The K-20 Educational Network was designed to provide cost-effective advanced telecommunications services to all of the state's educational institutions, including K-12 schools, public and private colleges and

¹ 47 USC §254.

universities and libraries.² After the State of Washington had substantially completed the construction of Phase I of the network,³ the Commission released its *First Report and Order* in the Universal Service proceeding,⁴ which specified that buying consortia that include private sector entities that are ineligible for universal service support must either purchase the interstate services of ILECs at generally tariffed rates, or the eligible schools and libraries participating in such consortia will not be able to use their universal service discounts for interstate services.⁵

3. On July 16, 1997, DIS filed a Petition for Reconsideration of the Commission's *First Report and Order*.⁶ In its *Petition*, DIS asked the Commission to reconsider its rules regarding the formation of and participation in buying consortia by public and private entities so that the State of Washington could proceed with its plans to integrate a small number of private nonprofit baccalaureate institutions into its K-20 Educational Network.⁷ In the alternative, DIS asked the

² Washington State Department of Information Services, *Petition for Reconsideration*, CC Dkt. No. 96-45, filed on Jul. 16, 1997 (hereinafter *Petition*), at 1, fn. 1.

³ *Petition* at 4.

⁴ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776 (rel. May 8, 1997) (hereinafter *First Report and Order*).

⁵ *Id.* at ¶¶ 33, 478.

⁶ *Petition*, *supra* note 1.

⁷ Specifically, DIS requested that we amend 47 C.F.R. §54.501(d), which states in relevant part:

(d) Consortia.

(1) For purposes of seeking competitive bids for telecommunications services, schools and libraries eligible for support under this subpart may form consortia with other eligible schools and libraries, with health care providers eligible under Subpart G, and with public sector (governmental) entities, including, but not limited to, state colleges and state universities, state educational broadcasters, counties, and municipalities, when ordering telecommunications and other supported services under this subpart. With one exception, eligible schools and

Continued on following page

Commission to waive the strict application of those rules based on the particular circumstances presented by Washington State's K-20 Educational Network.⁸

4. Today, Washington State's K-20 Educational Network links together the vast majority of the State's educational resources, including 304 K-12 school districts that serve some 2,000 individual schools and school buildings, 44 public baccalaureate sites and 64 community and public technical college sites. Additionally, the K-20 governing board has recently approved the connection of 68 public library systems. The waiver that DIS requests would permit the State of Washington to include some 15 private nonprofit baccalaureate institutions⁹ on the network without causing the many K-12 schools already on the network to lose their ability to use their universal services discounts or without causing the State of Washington to have to buy services for its K-20 Educational Network at generally tariffed rates.

III. DISCUSSION

Continued from previous page

libraries participating in consortia with ineligible private sector members shall not be eligible for discounts for interstate services under this subpart. A consortium may include ineligible private sector entities if the pre-discount prices of any services that such consortium receives from ILECs are generally tariffed rates.

⁸ *Petition for Reconsideration in CC Dkt. No. 96-45 filed by the Washington State Department of Information Services (regarding participation by schools and libraries eligible for universal service support in buying consortia that include private colleges)*, Letter from James P. Schulz to Irene Flannery and Praveen Goyal, Dec. 13, 1999.

⁹ The fifteen colleges identified to the Commission as of the date of this Order are: Antioch University, Bastyr College, City University, Cornish College of the Arts, Gonzaga University, Heritage College, Northwest College, Pacific Lutheran University, St. Martin's College, Seattle University, Seattle Pacific University, University of Puget Sound, Walla Walla College, Whitman College, and Whitworth College.

5. Generally, the Commission's rules may be waived for good cause shown.¹⁰ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate."¹¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹³ Waiver is, therefore, appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.¹⁴ Thus, the test for whether the State of Washington may be granted a waiver is whether it has shown special circumstances sufficient to warrant deviation from the rule adopted in the *First Report and Order*. We conclude that the State of Washington has made that showing, and we grant the waiver it has sought.

6. The State of Washington's situation raises the kind of particular facts and circumstances that warrant the grant of a waiver of the Commission's rules. In the *First Report and Order*, the Commission determined that the aggregation of eligible schools and libraries in buying consortia with other eligible and certain ineligible entities for the purpose of securing the lowest possible

¹⁰ 47 C.F.R. Sec. 1.3.

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

¹² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

¹³ *WAIT Radio*, 418 F.2d at 1157.

¹⁴ *Northeast Cellular*, 897 F.2d at 1166.

pre-discount prices for eligible services is in the public interest.¹⁵ This aggregation was specifically intended to include "the large state networks upon which many eligible schools and libraries depend for their telecommunications needs."¹⁶

7. However, the Commission determined that an exception to the largely permissive general rule regarding the formation of and participation in buying consortia was necessary to alleviate concerns "that permitting large private sector firms to join with eligible schools and libraries to seek below tariffed rates could compromise both the federal and state policies of non-discriminatory pricing."¹⁷

8. Federal policies of non-discriminatory pricing are designed to prevent entities presumed to possess market power from engaging in anticompetitive activities through different treatment of similarly-situated entities within a given market. For the following reasons, we find that nothing in the State of Washington's waiver request implicates those policies or otherwise undermines our goals in formulating the consortia rules.

9. The record before us indicates that the State of Washington is the only state that has legislatively mandated the creation of a statewide network solely to serve the needs of all of the state's educational institutions, from kindergarten through college (K-20). None of the nonprofit schools in question can be characterized as the type of business entity about which the

¹⁵ *Id.* at ¶¶ 475-478.

¹⁶ *Id.* at ¶ 478.

¹⁷ *First Report and Order* at ¶¶ 33, 477.

Commission expressed concern in its *First Report and Order*. Moreover, the schools in question produce approximately one-quarter of Washington State's K-12 teachers and, therefore, provide a direct benefit to the institutions eligible for universal service support.

9. Under the foregoing facts, the strict application of our rule would be inconsistent with the public interest. Strict application, contrary to the Commission's intent in permitting aggregation of buying power among eligible and ineligible entities in the first place, would either raise the pre-discount prices that eligible entities have to pay for services (and accordingly place more demands on already limited universal service funds), or would deny one-quarter of Washington State's future K-12 teachers access to the educational resources that the rest of the state's students and teachers enjoy and deprive eligible K-12 schools of the educational benefits to be derived through the inclusion of these private colleges on the State's network.

10. We therefore grant DIS's request for a waiver in order to permit the State of Washington to connect the subject schools to its K-20 Educational Network without adversely affecting the State's provision of services to the entities eligible for universal service support that are already connected to the network.

11. In granting this waiver, we note our obligation to maintain universal service support mechanisms that are "specific, predictable, and sufficient."¹⁸ Thus, we have considered carefully the consequences of making exceptions to rules designed to provide predictability, taking into account the impact on universal service if other states requested similar waivers to include

private nonprofit baccalaureate institutions in their networks. In view of the unique circumstances of Washington's K-20 Educational Network, we have concluded that granting Washington State's request for a waiver would not undermine the Commission's method for ensuring that universal service support mechanisms are "specific, predictable and sufficient." We emphasize that this waiver applies only to membership in the State of Washington's K-20 Educational Network by private nonprofit baccalaureate institutions, and is not intended to permit the inclusion of any other ineligible private sector entities within that network.

12. It is THEREFORE ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 154(i) and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. Secs. 0.91, 0.291, and 1.3, that the Washington State Department of Information Services' request for waiver IS GRANTED.

Continued from previous page

¹⁸ 47 U.S.C. Sec. 254(b)(5).

DIS / K-20 Backbone Network

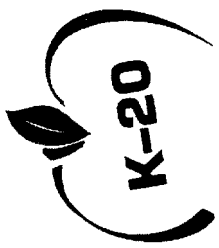


DIS / K-20 Backbone Network

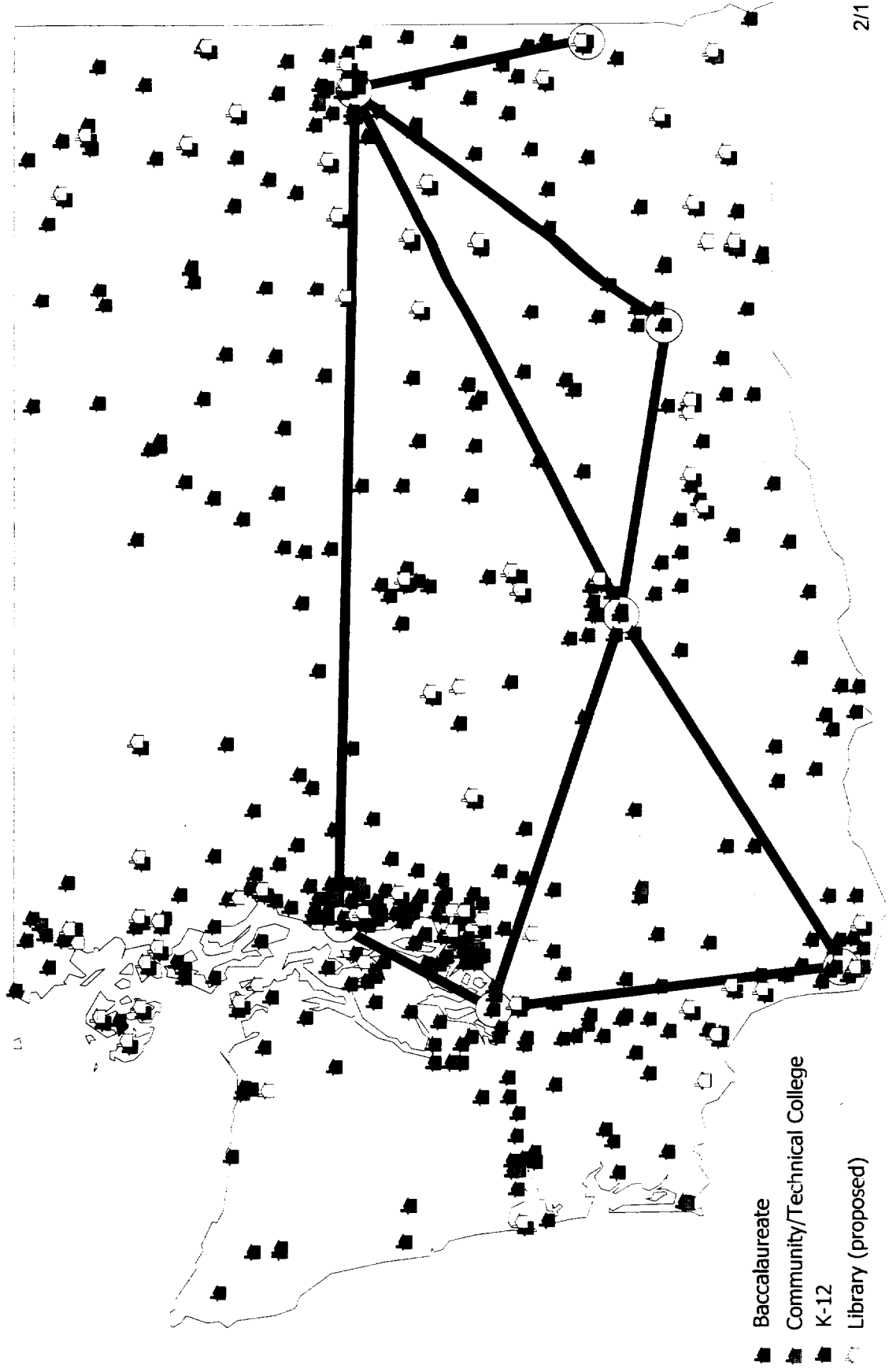


DIS / K-20 Backbone Network





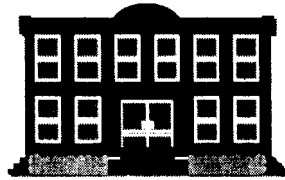
Educational Telecommunications Network



Implementation of Phases 1 and 2 sites is Complete - 412 Sites



Community and Technical Colleges



64 Sites

- ♦ All Community and Technical Colleges
- ♦ Selected Remote Campuses
- ♦ State Board

Baccalaureates



44 Sites

- ♦ UW
- ♦ WSU
- ♦ Central
- ♦ Eastern
- ♦ Western
- ♦ Evergreen
- ♦ Selected Remote Campuses

K-12



304 Sites

- ♦ Public School Districts
- ♦ Educational Service Districts
- ♦ Schools for Deaf and Blind
- ♦ OSPI

K-20 Network – Awards



- ♦ **Best Enterprise Access Network – Annual SUPERQuest Awards at SUPERCORE '99**
- ♦ **Outstanding Achievement in the Field of Information Technology – Networking; NASIRE**
- ♦ **International TeleCon Awards**
 - First Place, Best Network Service (1999)
 - First Place, Best Wide Area Networking Product/Service (1998)
 - Second Place, Best Distance Education Network (1999)
 - Third Place, Best User Application, K-20 Network-related videoconferencing training for the state's community and technical colleges (1998)
- ♦ **Best Application Award, Distance Learning/Training; International Teleconferencing Association**